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Attorney Docket No. P05453US0

REMARKS

Claims 1, 2 and 26-28 have been rejected under 35 U.S.C. § 103 as being obvious over Roth and Fitch. Claims 1, 2, 8 and 26-28 have been rejected under 35 U.S.C. § 103 based upon Kruse and Fitch. Claims 10, 12-13, and 18 have been rejected under § 103 based upon Ehlers and Titcombe. The remaining defendant claims 3-7, 9, 14, 15, 17, and 19 had been rejected under § 103 based upon various combinations of prior art references. Claims 11, 16 and 20-25 had previously been cancelled. Applicant respectfully traverses the rejections of the claims, and requests reconsideration of the claims.

Claim 1 has been amended to incorporate the limitation from cancelled claim 26. More particularly, claim 1 requires the guide plates incline "upwardly and outwardly from the perimeter edge of the bed." This limitation is not met by the cited references.

The Examiner acknowledges in paragraph 2 of the Office Action that the primary reference, Roth, does not show guide plates which incline outwardly from the bed. The Examiner cites the Fitch patent for guide plates which allegedly incline upwardly and outwardly from the bed. However, the Fitch corner brackets 21, 22 do not extend outwardly from the perimeter edge of the bed, as required by claim 1. Rather, the Fitch brackets 21, 22 are positioned entirely within the perimeter of the bed. The Examiner admits that even as modified, the guide plates do not have an upper edge which extends beyond the bed perimeters, but suggests that such a structure would be a "design expediency". However, "design expediency" is an improper basis for a § 103 obviousness rejection, which must be based upon prior art, as required by the statute.

There simply is no teaching or suggestion in Fitch that the angled portions of the brackets 21, 22 should extend outwardly beyond the perimeter edge of the bed, as required by claim 1.

Friesen

Attorney Docket No. P05453US0

Thus, even if Fitch is combined with Roth or Kruse, the modified structure does not meet the limitations of claim 1.

In a proper obviousness determination, the prior art must provide a teaching or suggestion to one of ordinary skill in the art to make the changes that would produce the claimed device. In re Chu, 66 F.3d 292, 298 (Fed. Cir. 1995). Even though a prior art device may be modified, the modification is not obvious unless the prior art fairly suggested the desirability of the modification. Id.; In re Fitch, 23 U.S.P.Q.2d 1780, 1783-84 (Fed. Cir. 1992).

Since Roth, Kruse and Fitch fail to teach or suggest the limitation of claim 1 that the guide plates extend outwardly from the perimeter edge of the bed, claim 1 distinguishes over the references so as to be in proper form for allowance. Claims 2-9, 27 and 28 depend from claim 1 and should be allowable as depending from an allowable base claim.

Independent claim 10, which has not been amended, requires lock bars pivotally connected to the bed for movement between unlocked and locked positions, with the unlocked position being "spaced outwardly from the perimeter edge of the bed" and the locked position being "spaced inwardly from the perimeter edge of the bed." The combination of Ehlers and Titcombe do not meet these limitations of claim 10.

More particularly, the Examiner admits that Ehlers does not show lock bars which are pivotally mounted to the bed, and relies on Titcombe as showing pivotally mounted bars. The Examiner asserts that the Titcombe bars would be "a more convenient means of securing the boxes on the vehicle." However, "mere convenience" is not a basis for an obviousness rejection. There must be a teaching or suggestion for combining the references. While the Titcombe lock bar may be actuated in one step rather than the two steps of the Ehlers lock bar, as asserted by the Examiner, there is a preliminary question as to whether a person skilled in the art would

Friesen

Attorney Docket No. P05453US0

substitute the Titcombe lock bar for the Ehlers lock bar. The Titcombe lock bar is a much more complex structure than the Ehlers lock bar, and includes many more component pieces which must be manufactured and assembled. Presumably, the additional pieces and assembly time required for the Titcombe lock bar would be greater than the material and labor costs for manufacturing the Ehlers lock bar.

The Examiner further asserts that the Titcombe lock bars do not extend beyond the bed perimeter, as required by claim 10, "simply because the load does not extend to the bed perimeter." However, the Titcombe lock bar must be mounted via the pin 30 to the bed frame, and necessarily extends inwardly from the bed perimeter. The Titcombe lock bar cannot be moved on the bed to a position wherein the locking member 24 would be outside the perimeter edge of the bed, in accordance with claim 1. In Figure 6 of Titcombe, if the locking member 24 removed outwardly beyond the perimeter edge of the bed, there would be no structure to which the mounting pin 30 could be connected. Thus, it is impossible to position the lock member 24 of Titcombe outside the bed perimeter, as suggested by the Examiner.

The Examiner further asserts that the Titcombe and Ehlers lock bars are "obvious design equivalents." There is no basis in either § 103 or the case law to support an obviousness rejection based upon "design equivalents." Rather, as the Federal Circuit has explained, there must be a clear and particular objective teaching or suggestion in the prior art for combining the references. In re Dembiczaik, 175 F.3d 994, 999 (Fed. Cir. 1999); In re Fitch, 972 F.2d 1260, 1265 (Fed. Cir. 1992). Since there is no clear and particular objective teaching, suggestion or motivation for replacing the Ehlers lock bar with the Titcombe pivotal lock mechanism, the obviousness rejection of claim 10 must be withdrawn. Furthermore, even if Titcombe is combined with Ehlers, the resulting modified lock mechanism does not extend outwardly beyond

Friesen

Attorney Docket No. P05453US0

the perimeter edge in the unlocked position, as required by claim 10. Therefore, claim 10 distinguishes over the cited references so as to be allowable.

Claims 12-15 and 17-19 depend from claim 10 and should be allowable as depending from an allowable base claim.

For purposes of 37 C.F.R. § 2.116, this amendment is being submitted after the final rejection for the purpose of addressing the Fitch patent, which has been cited for the first time in the final rejection, and so as to address the design choice and design equivalency assertions asserted by the Examiner against independent claims 1 and 10 for the first time in the final rejection. Therefore, Applicant has not previously had an opportunity to address the new art and new assertions against the independent claims. Also, the amendment to claim 1 merely incorporates limitations from a depending claim, and therefore it does not raise new issues or require additional searching.

In view of the foregoing, Applicant respectfully requests that the present Amendment be entered and that a Notice of Allowance be issued.

No fees or extensions of time are believed to be due in connection with this amendment; however, consider this a request for any extension inadvertently omitted, and charge any additional fees to Deposit Account No. 26-0084.

Respectfully submitted,



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